No. 15-138

IN THE

Supreme Court of the United States

RJR NABISCO, INC., *et al.*,

Petitioners,

v.

THE EUROPEAN COMMUNITY, ACTING ON ITS OWN BEHALF AND ON BEHALF OF THE MEMBER STATES IT HAS POWER TO REPRESENT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

KEVIN A. MALONE
CARLOS A. ACEVEDO
KRUPNICK CAMPBELL MALONE BUSER SLAMA HANCOCK LIBERMAN P.A.
12 Southeast Seventh Street
Suite 801
Fort Lauderdale, Florida 33301
(954) 763-8181

JOHN J. HALLORAN, JR.
Counsel of Record
JOHN J. HALLORAN, JR., P.C.
Westchester Financial Center
50 Main Street, Suite 1000
White Plains, New York 10606
(914) 682-2077
jjh@halloranlawpc.com

Attorneys for Respondents

261044

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Petitioners, Reynolds American Inc. and associated entities ("Reynolds"), have directed a U.S.-based scheme to sell and distribute U.S.-made cigarettes to and through organized crime, sanctioned regimes, and terrorist groups, and laundered and repatriated the criminal proceeds through U.S. financial institutions. The main objective of this case is equitable relief under State common law in order to enjoin and deter Reynolds' damaging and dangerous conduct. The district court dismissed the Complaint, the Second Circuit unanimously reversed and remanded and, in this interlocutory posture, Reynolds now seeks review. The restated question presented is:

Whether the Second Circuit properly held that the Complaint sufficiently pled RICO claims for purposes of Rule 12(b)(6) of the Federal Rules of Civil Procedure where the court determined: (i) the conduct alleged clearly states a domestic cause of action arising from violations of the predicate statutes of wire fraud, mail fraud and the Travel Act; (ii) plaintiffs have pled a domestic investment of racketeering proceeds; and (iii) plaintiffs adequately alleged violations of the money laundering and material support of terrorism statutes based on the circumstances alleged in the Complaint.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS..... ii

TABLE OF CITED AUTHORITIES v

STATEMENT OF THE CASE 1

A. Factual Background 1

B. Proceedings Below 4

1. The District Court's Decisions 4

2. The Appeal..... 5

3. The *Amicus Curiae* Intervention of the United States 6

4. The Second Circuit's Main Opinion 7

5. The Second Circuit's *Per Curiam* Opinion 9

6. The Second Circuit's Denial of Rehearing *En Banc* 10

Table of Contents

Page

REASONS FOR DENYING THE PETITION 10

I. This Case Is A Poor Vehicle To Address Extraterritoriality 10

A. RICO Extraterritoriality Is Not Squarely Presented 10

B. This Case Is In An Interlocutory And Fluid Posture 13

C. The Fact-Bound, Rule 12(b)(6) Decision Below Has Limited Impact 16

II. The Question Presented Does Not Warrant This Court's Review 18

A. There Is No Genuine Conflict With The Law Of The Ninth Circuit 18

B. The Second Circuit Correctly Applied *Morrison* 24

(a) The Second Circuit's Decision Is Rooted In RICO's Text 24

(b) The Second Circuit Correctly Construed RICO As A Whole 26

Table of Contents

Page

(c) The Second Circuit's Decision Is Reinforced By RICO's History 32

(d) The Second Circuit Correctly Rejected the "Domestic Injury" Limit 34

CONCLUSION 36

TABLE OF CITED AUTHORITIES

Page

CASES

Aaron v. SEC,
446 U.S. 680 (1980) 30

Basic Inc. v. Levinson,
485 U.S. 224 (1988) 30

Boise Cascade Corp. v. United States EPA,
942 F.2d 1427 (9th Cir. 1991) 21

Branch v. Smith,
538 U.S. 254 (2003) 27, 28, 29

Bridge v. Phoenix Bond & Indemnity Co.,
553 U.S. 639 (2008) 30, 35

Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.,
389 U.S. 327 (1967) 14

CGC Holding Co., LLC v. Broad & Cassel,
773 F.3d 1076 (10th Cir. 2014) 23

Chua Han Mow v. United States,
730 F.2d 1308 (9th Cir. 1984), *cert. denied*,
470 U.S. 1031 (1985) 21

EEOC v. Arabian Am. Oil Co.,
499 U.S. 244 (1991) 27, 28, 29

Cited Authorities

Page

European Community v. RJR Nabisco, Inc., 355 F.3d 123 (2d Cir. 2004), *vacated and remanded*, 544 U.S. 1012 (2005), *opinion reinstated*, 424 F.3d 175 (2d Cir. 2005), *cert. denied*, 546 U.S. 1092 (2006) 1

Garcia v. Brockway, 526 F.3d 456 (9th Cir. 2008) 21

H. J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229 (1989).....35

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916).....14

Hartford Fire Ins. Co. v. Cal., 509 U.S. 764 (1993).....17

Hourani v. Mirtchev, 2015 U.S. App. LEXIS 13342 (D.C. Cir. July 31, 2015).....23

Joseph v. United States, 135 S. Ct. 705 (2014).....29

Laydon v. Mizuho Bank, Ltd., 2015 U.S. Dist. LEXIS 44126 (S.D.N.Y. Mar. 31, 2015).....16

Leocal v. Ashcroft, 543 U.S. 1 (2004).....30

Cited Authorities

Page

Major League Baseball Players Ass'n v. Garvey,
532 U.S. 504 (2001) 15

Mitsui O.S.K. Lines, Ltd. v. Seamaster Logistics, Inc.,
871 F. Supp. 2d 933 (N.D. Cal. 2012),
remanded on other grounds,
2015 U.S. App. LEXIS 11574
(9th Cir. Cal. July 6, 2015) 34

Morrison v. National Australia Bank Ltd.,
561 U.S. 247 (2010) ..... *passim*

National Organization for Women, Inc. v. Scheidler,
510 U.S. 249 (1994) 35

NCAA v. Smith,
525 U.S. 459 (1999) 15

Norex Petroleum Ltd. v. Access Indus., Inc.,
631 F.3d 29 (2d Cir. 2010) ..... *passim*

Office of Senator Mark Dayton v. Hanson,
550 U.S. 511 (2007) 14

Pasquantino v. United States,
544 U.S. 349 (2005) 13

Cited Authorities

Page

Petroleos Mexicanos v. Hewlett-Packard Co.,
No. 14-cv-05292-BLF, ECF No. 60
(N.D. Cal. July 13, 2015) 21, 34

Petroleos Mexicanos v. SK Eng'g & Constr. Co.,
572 Fed. Appx. 60, 2014 U.S. App. LEXIS
13496 (2d Cir. 2014), *reh'g denied*, Order
(2d Cir. Aug. 25, 2014) 16

Pfizer, Inc. v. Gov't of India,
434 U.S. 308 (1978).....35

Poulos v. Caesars World, Inc.,
379 F.3d 654 (9th Cir. 2004) 20

SEC v. Berger,
322 F.3d 187 (2d Cir. 2003) 34

Sedima, S.P.R.L. v. Imrex Co.,
473 U.S. 479 (1985).....29, 35

Small v. United States,
544 U.S. 385 (2005) 32

United States v. Ali,
718 F.3d 929 (D.C. Cir. 2013).....22

United States v. Chao Fan Xu,
706 F.3d 965 (9th Cir. 2013)..... *passim*

Page

United States v. Felix-Gutierrez,
940 F.2d 1200 (9th Cir. 1991).....21

United States v. Hill,
279 F.3d 731 (9th Cir. 2002) 21

United States v. Kazzaz,
592 F. App'x 553 (9th Cir. 2014), *cert. denied*,
135 S. Ct. 2388 (2015).....13

United States v. Lawrence,
727 F.3d 386 (5th Cir. 2013), *cert. denied*,
134 S. Ct. 1340 (2014).....22

United States v. Layton,
855 F.2d 1388 (9th Cir. 1988) 22

United States v. Neal,
776 F.3d 645 (9th Cir. 2015).....21

United States v. Prevezon Holdings Ltd.,
2015 U.S. Dist. LEXIS 104204
(S.D.N.Y. Aug. 7, 2015).....17

United States v. Rone,
598 F.2d 564 (9th Cir. 1979), *cert. denied*,
445 U.S. 946 (1980).....21

United States v. Shibin,
722 F.3d 233 (4th Cir. 2013), *cert. denied*,
134 S. Ct. 1935 (2014).....22-23

Cited Authorities

Page

United States v. Siddiqui,
699 F.3d 690 (2d Cir. 2012), *cert. denied*,
133 S. Ct. 2371 (2013) 22

United States v. Sidorenko,
2015 U.S. Dist. LEXIS 52452 (N.D. Cal.
Apr. 21, 2015), *appeal dismissed*, Order
(9th Cir. July 20, 2015) 17

United States v. Turkette,
452 U.S. 576 (1981) 18

VMI v. United States,
508 U.S. 946 (1993) 14

Wisniewski v. United States,
353 U.S. 901 (1957) 29

STATUTES AND OTHER AUTHORITIES

18 U.S.C. § 1956(c)(7) 33

18 U.S.C. § 1961(1)(G) 32

18 U.S.C. § 1962 8

18 U.S.C. § 1962(a) 4, 8, 12

18 U.S.C. § 1962(c) 30

18 U.S.C. § 1964(c) ..... *passim*

18 U.S.C. §§ 1961-1968 ..... *passim*

28 U.S.C. § 1603(b) 6, 7

Fed. R. Civ. P. 12(b)(6) 4, 7, 16

147 Cong. Rec. H7198 (daily ed. Oct. 23, 2001) 33

147 Cong. Rec. S11028-29 (daily ed. Oct. 25, 2001) 33

Pub. L. No. 107-56, § 315, 115 Stat. 272 (Oct. 26, 2001) 33

Pub. L. No. 107-56, § 813, 115 Stat. 272 (Oct. 26, 2001) 32

Securities and Exchange Act of 1934, § 10(b) 27, 34

Mark Hamblett, Circuit Declines En Banc Review of RJR Nabisco Ruling, N.Y.L.J., April 14, 2015 16

Report of the House Committee on the Judiciary, H. Rept. 107-236 on H.R. 2975 (Part 1) (Oct. 11, 2001) 32, 33

Stephen M. Shapiro *et al.*, *Supreme Court Practice* (10th ed. 2013) 19, 23

STATEMENT OF THE CASE

A. Factual Background

For many years, Reynolds has sold cigarettes through organized crime, money launderers, and sanctioned regimes.[1] To combat this scheme, the European Community and 26 of its Member States ("Plaintiffs") filed this action in the District Court for the Eastern District of New York in 2002. The core of the case is Plaintiffs' claim for equitable relief under New York's common law, which is binding by stipulation with respect to the State law claims. The State common law claims include fraud, public nuisance/damages, public nuisance/injunctive relief, unjust enrichment, negligence, negligent misrepresentation, conversion, and money had and received. Plaintiffs also alleged civil claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961-1968, and federal common law. The Second Circuit's summary of the Complaint's factual background (Pet.App. 3a- 5a, 16a-23a, 13a-14a n.5) is adopted herein. A brief summary of the principal domestic allegations is appropriate, however, because Reynolds overlooks the inherently domestic nature of the RICO claims, and disregards the holding of the unanimous Second Circuit that "the conduct alleged here clearly states a *domestic* cause of action." Pet.App. 23a (emphasis added).

---

1. The Complaint is found in Petitioners' Appendix ("Pet. App.") at 131a. This case is preceded by related litigation among the parties. *European Community v. RJR Nabisco, Inc.*, 355 F.3d 123 (2d Cir. 2004) (Sotomayor, J.), *vacated and remanded*, 544 U.S. 1012 (2005), *opinion reinstated*, 424 F.3d 175 (2d Cir. 2005) (Sotomayor, J.), *cert. denied*, 546 U.S. 1092 (2006).

Overview

All of the Reynolds defendants are U.S. companies, incorporated in the United States, with headquarters, operations, and manufacturing facilities located throughout the United States. Pet.App. 140a-150a. Reynolds distributed U.S.-manufactured products through U.S. ports into criminal channels (*see, e.g.*, Pet.App. 158a-159a, 162a-164a, 177a-181a, 194a) and received criminal proceeds in payment in the Reynolds defendants' accounts in the United States. *See, e.g.*, Pet. App. 134a, 175a, 200a, 201a. "The vast majority of the activities of the [Reynolds] DEFENDANTS that are the subject matter of [the] complaint, including management decisions and direction of the schemes, are conducted by the [Reynolds] DEFENDANTS in the United States and, more particularly, from the [Reynolds] DEFENDANTS' offices in the State and City of New York." Pet.App. 203a-204a.

Domestic Pattern of Racketeering Activity

As stated by the Second Circuit, the Complaint alleged that Reynolds "orchestrated a global money-laundering scheme *from the United States* by sending employees and communications abroad." Pet.App. 21a (emphasis added). For example, "RJR 'communicated . . . with [its] coconspirators on virtually a daily basis by means of *U.S. interstate* and international wires as a means of obtaining orders for cigarettes, arranging for the sale and shipment of cigarettes, and arranging for and receiving payment for the cigarettes in question'" (Pet.App. 21a) (emphasis added), which payments included criminal proceeds that were remitted to Reynolds' accounts *in the United States*

(Pet.App. 134a, 175a, 200a-201a), and specifically in *New York City*. Pet.App. 134(a) (emphasis added). "RJR and its coconspirators 'utilized the *interstate* and international mail and wires, and other means of communication, to prepare and transmit documents that intentionally misstated the purchases of the cigarettes in question so as to mislead the authorities *within the United States*, the European Community, and the Member States.'" Pet.App. 21a (emphasis added); *see also* Pet.App. 202(a) ("Large volumes of false documents have been filed with the United States Customs Service and the Bureau of Alcohol, Tobacco and Firearms by the RJR DEFENDANTS and/or their coconspirators. The purpose of these filings was to deceive the United States Customs Service and the Bureau of Alcohol, Tobacco and Firearms and allow the criminal activity to continue"). "The Complaint alleges that 'the *U.S. mails and wires* are used by [RJR] to bill and pay for the cigarettes, to confirm billing and payment for the cigarettes, to account for the payment of the cigarettes to [RJR] and [its] subsidiaries, and to maintain an accounting of the proceeds received by [RJR] from the sale of the cigarettes, with said proceeds ultimately being returned to [RJR] *in the United States*.'" Pet.App. 21a-22a (emphasis added). "The Complaint furthermore alleges: . . . RJR executives traveled *from the United States* to Europe and South America to meet with, entertain, and maintain relations with RJR's criminal customers." Pet. App. 22a (emphasis added).

Domestic Investment/Acquisition: "Domestic Operations of Brown & Williamson"

In 2004, Reynolds invested its repatriated racketeering proceeds to acquire "the domestic operations of Brown

& Williamson." Pet.App. 188a-190a. This investment and acquisition was specifically designed by the Reynolds defendants to enable them to "continue and build upon" their money-laundering "enterprise" and "make use of . . . the domestic operations of Brown & Williamson, for the purpose of expanding upon their illegal cigarette sales and money-laundering activities." Pet.App. 189a. The Second Circuit determined that the Complaint sufficiently pled "that RJR acquired Brown & Williamson Tobacco 'for the purpose of expanding upon their illegal cigarette sales and money-laundering activities'" (Pet.App. 5a) and twice held that such allegations stated a claim under 18 U.S.C. 1962(a). *See* Pet.App. 13a-14a n.5; Pet.App. 57a n.1.

B. Proceedings Below

1. The District Court's Decisions

On April 30, 2010, Reynolds moved to dismiss the RICO claims under Fed. R. Civ. P. 12(b)(6). In 2010, this Court decided *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), and the Second Circuit summarily applied *Morrison* to RICO in a brief, *per curiam* opinion. *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29 (2d Cir. 2010) (*per curiam*). The district court ordered supplemental briefing to address *Morrison* and *Norex*, and the juridical status of the European Community. On March 8, 2011, the district court dismissed the RICO claims under Fed. R. Civ. P. 12(b)(6) on the ground that RICO has no application to activity outside the territory of the United States and cannot apply to a foreign enterprise. Pet.App. 37a-54a. On May 13, 2011, the district court dismissed the State common law claims on the ground that the court lacked diversity jurisdiction. Pet.App. 2a.

2. The Appeal

On appeal, Plaintiffs underscored: "The main objective of this action is to obtain enforceable equitable relief that will enjoin the scheme, and compel RJR to adopt the same standards of corporate conduct already embraced by other large multinational tobacco companies, which have already entered into cooperation agreements with the EC and all of its Member States." 2d Cir. Dkt. ECF No. 52 at 4. Plaintiffs' principal argument was that the European Community met the statutory prerequisites for diversity jurisdiction.

Plaintiffs argued that their RICO claims were *domestic* in nature and should not have been dismissed as extraterritorial. *See* 2d Cir. Dkt. ECF No. 52 at 48-49 ("Plaintiffs' RICO claims seek to eradicate a U.S.-based organized criminal conspiracy and thus fall well within RICO's purview under *Norex*. The racketeering activities giving rise to Plaintiffs' claims -- including the pattern of racketeering activity, and the use of its proceeds to commit RICO violations -- occurred in the United States") (citations omitted). Plaintiffs further argued that, even if RICO were limited to domestic enterprises, the Complaint sufficiently alleged that a domestic enterprise was at the heart of the RICO conspiracy. *Id.* at 53 ("the RJR Defendants (U.S. citizens) used and invested the proceeds of racketeering activity, which were repatriated to them in the United States through financial institutions in New York City, to acquire a ***domestic*** enterprise, namely the U.S.-based 'domestic operations of Brown & Williamson, for the purpose of expanding upon [RJR's] illegal cigarette

sales and money-laundering activities") (emphasis in original) (citations omitted).[2]

3. The *Amicus Curiae* Intervention of the United States

On October 7, 2011, the United States intervened as *amicus curiae* in the Second Circuit. 2d Cir. Dkt. ECF No. 63. In its *amicus curiae* brief, signed by the Department of Justice and Department of State, the United States maintained, *inter alia*: (1) the European Community is an "agency or instrumentality" of its Member States within the meaning of the FSIA, and thus a "foreign state" within the meaning of the diversity statute (*id.* at 23-29); (2) RICO claims are territorial either if the enterprise is located or operating within the United States or if the pattern of racketeering occurs within the United States (*id.* at 9-20); and (3) "the United States believes that RICO meets *Morrison's* requirement of a 'clear indication of an extraterritorial application' in part because some of RICO's predicate crimes can only be violated by extraterritorial conduct." *Id.* at 9-10 n.3 (citations omitted). The United States limited its discussion of RICO to its application in the governmental context and declined to "opine on whether the EC's RICO claims are territorial under the standard we propose." *Id.* at 20 n.7.

On February 24, 2012, the appeal was argued before the Second Circuit (Leval, Hall, Sack, JJ.). On March 2,

---

2. Plaintiffs also argued that the district court erred in denying leave to amend the complaint to bolster material domestic allegations in the aftermath of *Morrison* (*id.* at 54-58) and in dismissing the federal common law claims. *Id.* at 59-61.

2012, the United States provided a letter to the court listing RICO predicates that by their express terms apply extraterritorially.[3]

4. The Second Circuit's Main Opinion

On April 23, 2014, the Second Circuit unanimously reversed and vacated the judgment of the district court, and remanded the case for further proceedings. Pet.App. 1a-36a.

(i) *Diversity.* The court restored diversity jurisdiction by holding that the European Community was an "agency or instrumentality" of its Member States within the meaning of the Foreign Sovereign Immunities Act (28 U.S.C. 1603(b)). Pet.App. 24a-36a. Reynolds does not challenge this holding before this Court. Pet. 8 n.2.

(ii) *RICO.* The court found that the Complaint sufficiently pled RICO claims for the limited purpose of Rule 12(b)(6). In addressing the scope of RICO, the court applied *Morrison* and the presumption against extraterritoriality, and considered RICO's clear and unambiguous text. The court of appeals construed RICO as an integrated, reticulated whole, reading RICO's private right of action (18 U.S.C. 1964(c)) in conjunction with incorporated substantive provisions of

---

3. *See* Letter of Lewis S. Yelin, Esq., U.S. Department of Justice, 2d Cir. Dkt. ECF No. 114 ("At oral argument . . . I informed the Court that the Racketeer Influenced and Corrupt Organizations Act (RICO) contains some predicate crimes that, by their express terms, apply extraterritorially. During the argument, the Court asked the United States to provide a list of such predicate crimes. This letter responds to that request").

RICO (18 U.S.C. 1962). *See* Pet.App. 7a-8a, 13a, 18a n.8. Addressing RICO's limited extraterritorial reach under its interrelated provisions, the court held: "We conclude that RICO applies extraterritorially if, and only if, liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate." Pet.App. 9a. The court also explained its decision to read RICO as a whole, stating: "the predicate statutes are incorporated by reference into the RICO statute and are a part of it." Pet.App. 18a n.8.

On this basis, the Second Circuit held:

(a) *Domestic Pattern of Racketeering.* "[T]he conduct alleged here clearly states a domestic cause of action" because the Complaint "satisfies every essential element of the mail fraud, wire fraud, and Travel Act claims" alleged as part of the domestic "pattern of conduct." Pet. App. 23a-24a.

(b) *Domestic Enterprise.* Plaintiffs adequately alleged a RICO violation involving investment in a domestic enterprise in violation of Section 1962(a). Pet.App. 13a-14a n.5. As determined by the court below: "Whether the investment constituting a violation of § 1962(a) must be domestic is without consequence here, because Plaintiffs have pled a domestic investment of racketeering proceeds in the form of RJR's merger in the United States with Brown & Williamson and investments in other U.S. operations." *Id.* (citations omitted).

(c) *Money Laundering and Material Support of Terrorism.* Plaintiffs adequately alleged violations of the money laundering and material support of

terrorism statutes based on the "circumstances alleged in the Complaint." Pet.App. 16a. These statutes apply extraterritorially under specified circumstances. *Id.* at 16a-18a.

(iii) *Amendment.* The court's holding that "the conduct alleged here clearly states a *domestic* cause of action" (Pet.App. 23a-24a) (emphasis added) obviated any need for the court to address Plaintiffs' request to amend the Complaint.

5. The Second Circuit's *Per Curiam* Opinion

On May 7, 2014, Reynolds filed its first petition for panel rehearing and rehearing *en banc*. On August 20, 2014, without calling for a response, the Second Circuit unanimously denied Reynolds' petition for panel rehearing in a *per curiam* opinion. Pet.App. 55a-58a. The court held that Section 1964(c) does not require a domestic injury. *Id.* This decision was consistent with *Morrison* inasmuch as the "[t]he presumption against extraterritoriality . . . is primarily concerned with the question of what *conduct* falls within a statute's purview." *Id.* at 58a (emphasis in original). Moreover, the court below held that this Court "has stated unequivocally that 'the compensable injury' addressed by § 1964(c) 'necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern.'" *Id.* at 56a (citation omitted). "If an injury abroad was proximately caused by the violation of a statute which Congress intended should apply to injurious conduct performed abroad, we see no reason to import a domestic injury requirement simply because the victim sought redress through the RICO statute." *Id.* at 57a-58a. Reynolds challenged this decision in a second petition for rehearing *en banc*.

6. The Second Circuit's Denial of Rehearing *En Banc*.

On April 13, 2015, without calling for a response, the court of appeals denied Reynolds' two petitions for rehearing *en banc*. Pet.App. 59a-60a. Judge Hall, a member of the original panel, concurred in the denial of rehearing *en banc*, and reaffirmed the decision of the unanimous panel. Pet.App. 60a-68a. Five Judges dissented from denial of *en banc* review, on varying rationales. Pet. App. 68a-104a. On April 20, 2015, the Second Circuit issued its mandate and remanded the case to the district court for further proceedings. On June 4, 2015, the district court stayed proceedings pending this Court's disposition of the petition.

REASONS FOR DENYING THE PETITION

I. This Case Is A Poor Vehicle To Address Extraterritoriality.

Review by this Court is not warranted because the case is an inappropriate vehicle to address the issue of RICO extraterritoriality.

A. RICO Extraterritoriality Is Not Squarely Presented.

This Court should not grant review to address RICO extraterritoriality because this case does not present a genuine problem of extraterritoriality.

In its overarching and overly-aggressive argument, Reynolds argues that this case just involves "foreign

patterns of racketeering conducted through foreign enterprises and causing foreign injuries" (Pet. 12), which it calls a "foreign-cubed" dispute. Pet. 2, 12, 23. Reynolds is entirely mistaken. As detailed below, the Complaint alleges RICO claims that involve domestic racketeering (as held by the Second Circuit); a domestic enterprise (as held by the Second Circuit); and domestic injuries (as recognized by Reynolds in the court below).

First, this case unquestionably involves domestic racketeering activity committed by a group of U.S. companies. The Second Circuit held that "the conduct alleged here clearly states a *domestic cause of action*." Pet. App. 23a (emphasis added). In reaching this determination, the court summarized the domestic schemes:

> The complaint alleges that defendants hatched schemes to defraud in the United States, and that they used the U.S. mails and wires in furtherance of those schemes and with the intent to do so. Defendants are also alleged to have traveled from and to the United States in furtherance of their schemes. In other words, plaintiffs have alleged conduct in the United States that satisfies every essential element of the mail fraud, wire fraud, and Travel Act claims.

Pet.App. 23a. The court held that Plaintiffs alleged that all elements of the wire fraud, mail fraud, and Travel Act violations "were completed in the United States or while crossing U.S. borders [and] we conclude that the Complaint states *domestic RICO claims* based on violations of those predicates." Pet.App. 16a-17a (emphasis

added). In denying panel rehearing, the court reconfirmed that "the plaintiffs have also alleged that RJR engaged in conduct in the United States satisfying every essential element of each RICO predicate statute that does not apply extraterritorially." Pet.App. 57a n.1. Reynolds' argument, that this case just involves "foreign patterns of racketeering" (Pet. 12), is demonstrably inaccurate.

Second, this case unquestionably involves a domestic enterprise. The Second Circuit twice held that the Complaint sufficiently alleged a proscribed investment in a *domestic* enterprise under 18 U.S.C. 1962(a). Pet. App. 13a-14a n.5; 57a n.1. Specifically, the Second Circuit recognized that the Complaint alleged "that RJR received the profits of its money-laundering schemes in the United States; and that RJR acquired Brown & Williamson Tobacco 'for the purpose of expanding upon their illegal cigarette sales and money-laundering activities.'" Pet. App. 4a-5a (citation omitted). Confirming that a domestic enterprise (Brown & Williamson) is at the heart of the Complaint, the court below held that: "Plaintiffs have pled a domestic investment of racketeering proceeds in the form of RJR's merger in the United States with Brown & Williamson and investments in other U.S. operations." Pet.App. 13a-14a n.5 (citations omitted). On rehearing, the panel reconfirmed that "the plaintiffs have pled a domestic investment with respect to their claims under § 1962(a)." Pet.App. 57a n.1. Reynolds' argument, that this case only involves a "foreign enterprise" (Pet. 12, 30), is demonstrably inaccurate.

Third, this case unquestionably involves domestic, as well as foreign, injuries, as Reynolds recognized in the court below. Plaintiffs alleged injuries to business or

property, including in markets in which Plaintiff Member States directly competed with Reynolds, including "the United States." Pet.App. 210a at ¶ 146(a)). Reynolds recognized this allegation in the court below. *See* 2d Cir. Dkt. ECF No. 72 at 17 citing ¶ 146(a). Reynolds' argument, that this case only involves "foreign injuries" (Pet. 12, 30), is demonstrably inaccurate.

Under these circumstances, an application of RICO to the domestic claims sustained by the Second Circuit presents no issue of extraterritoriality. *See Pasquantino v. United States*, 544 U.S. 349, 371 (2005) (application of the wire-fraud statute did not have extraterritorial effect where defendants "used U.S. interstate wires to execute a scheme to defraud a foreign sovereign"); *United States v. Kazzaz*, 592 F. App'x 553, 554 (9th Cir. 2014) ("Because the stipulated facts show a sufficient domestic nexus with the United States for the mail-fraud and wire-fraud counts, we need not address whether these statutes have extraterritorial application"), *cert. denied*, 135 S. Ct. 2388 (2015). Inasmuch as the RICO claims are intrinsically domestic, a decision by this Court on the Question Presented in the petition would not address, much less resolve, the viability of the *domestic* claims that have already been sustained by the Second Circuit. Thus, RICO extraterritoriality is not squarely presented, and review should be denied on this ground alone.

B. This Case Is In An Interlocutory And Fluid Posture.

Review by this Court is not warranted because the judgment below is interlocutory and the case has been "REMANDED for further proceedings." Pet.App. 36a.

That fact "of itself alone furnishe[s] sufficient ground for the denial" of review. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari to review adverse rulings "because the Court of Appeals remanded the case," making it "not yet ripe for review by this Court"); *Office of Senator Mark Dayton v. Hanson*, 550 U.S. 511, 515 (2007) (finding no "special circumstances" to "justify the exercise of our discretionary certiorari jurisdiction to review" an interlocutory order). This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *VMI v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of certiorari).

This Court's general rule against review of interlocutory judgments has particular force in this case. The Second Circuit underscored the interlocutory nature of its judgment, and recognized that the contours of this case may well change during proceedings on remand:

> We note that, as we are reviewing a dismissal based solely on the contents of the Complaint, our conclusion is based entirely on the Complaint, which we find sufficient to state an actionable claim. Plaintiffs' ability to prevail will depend, in part, on their ability to present evidence showing that the alleged statutory violation was domestic. Should the pattern of conduct of certain Defendants or certain schemes prove to be extraterritorial, the district court may need to narrow the scope of this action accordingly, through either motions for (partial) summary

> judgment or through carefully tailored jury instructions.

Pet.App. 23a-24a (addressing pattern based on domestic RICO predicates). There is no need for immediate action by this Court at this early stage because Reynolds can, if appropriate, raise any surviving RICO issue upon final judgment and a full evidentiary record. *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (*per curiam*) (this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment).

In the end, even if this Court were to grant review and find the RICO claims insufficient, a remand would likely be necessary to allow the court below to address Plaintiffs' alternative argument that the district court erred in denying Plaintiffs' request to amend the Complaint in the aftermath of *Morrison*. *See NCAA v. Smith*, 525 U.S. 459, 469-470 (1999) (refusing to reach "alternative theories" advanced by respondent in defending judgment in this Court, when theories were not decided below). The Second Circuit held that "the conduct alleged here clearly states a domestic cause of action" (Pet.App.23a) and thus it had no occasion to address Plaintiffs' alternative argument that the district court erred in denying leave to amend to bolster material domestic contacts. A hypothetical decision by this Court (finding the RICO claims insufficient) would not fully and finally resolve the Question Presented in the petition, but rather, set in motion a new and avoidable cycle of litigation on remand. This unsettled state of affairs militates against review by this Court.

C. The Fact-Bound, Rule 12(b)(6) Decision Below Has Limited Impact.

Reynolds' speculation about the supposed untoward results arising from the decision below is highly exaggerated. Pet. 27-29.

First, Reynolds overlooks the early, procedural posture of this case. The court below addressed the Complaint's allegations for the limited purposes of Rule 12(b)(6), and assumed the truth of the allegations, without the benefit of any evidentiary record. The Second Circuit made no findings, enjoined no conduct, and did not alter the status quo. The judgment below is interlocutory and the case is on remand; indeed, Reynolds has publicly predicted that it will prevail on remand.[4] The decision below is limited in scope and affects Reynolds alone.

Second, Reynolds' speculation is belied by actual experience. The decision below has proved to be entirely workable in practice and has been applied to effect the *dismissal* of civil RICO claims -- not to open the floodgates to private, civil litigation. *See, e.g., Petroleos Mexicanos v. SK Eng'g & Constr. Co.*, 572 Fed. Appx. 60, 2014 U.S. App. LEXIS 13496 (2d Cir. 2014) (summary order) (affirming dismissal of RICO claims), *reh'g denied*, Order (2d Cir. Aug. 25, 2014); *Laydon v. Mizuho Bank, Ltd.*, 2015 U.S. Dist. LEXIS 44126, *29-33 (S.D.N.Y. Mar. 31, 2015) (RICO claim predicated on wire fraud dismissed for

---

4. *See, e.g.*, Mark Hamblett, Circuit Declines En Banc Review of RJR Nabisco Ruling, N.Y.L.J., April 14, 2015 ("David Howard, a spokesman for R.J. Reynolds Tobacco Company, said in an email . . . 'we have many other strong legal grounds for securing dismissal of this case, and we look forward to presenting them to the district court on remand'").

insufficient domestic contacts); *see also United States v. Prevezon Holdings Ltd.*, 2015 U.S. Dist. LEXIS 104204, *27 (S.D.N.Y. Aug. 7, 2015) ("The court finds that the wire fraud alleged . . . is not sufficiently domestic and is therefore not actionable under U.S. law"); *United States v. Sidorenko*, 2015 U.S. Dist. LEXIS 52452, *10-11 (N.D. Cal. Apr. 21, 2015) (dismissal of an indictment for wire fraud), *appeal dismissed*, Order (9th Cir. July 20, 2015).

Third, the decision below does not invite RICO claims or prosecutions based on "'extraterritorial activities anywhere in the world.'" Pet. 27 (citation omitted). A RICO claim is more than warranted where, as here, there are well-founded allegations that U.S. companies, acting on U.S. soil and using U.S. financial institutions, have engaged in domestic racketeering involving a domestic enterprise resulting in domestic injuries. The claim is particularly justified where, as here, the defendants have not committed to voluntarily cease their documented wrongdoing. It is out of necessity that Plaintiffs have sought relief in a U.S. court, under U.S. domestic law, for U.S. wrongdoing, committed by U.S. defendants. RICO was designed for such situations.[5]

---

5. Reynolds also argues that the application of RICO in this case threatens international comity. Pet. 28-29. No issue of comity is presented because Reynolds does not identify "whether 'there is in fact a true conflict between domestic and foreign law.'" *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 798 (1993) (citation omitted).

II. The Question Presented Does Not Warrant This Court's Review.

In any event, the Question Presented in the petition does not warrant review in this case.

A. There Is No Genuine Conflict With The Law Of The Ninth Circuit.

The cornerstone of Reynolds' petition is the assertion that the decision below conflicts with *United States v. Chao Fan Xu*, 706 F.3d 965 (9th Cir. 2013) about the territorial scope of RICO. Pet. 2, 11, 16, 19-20, 24, 26, 31. In fact, there is no genuine conflict, much less the sort of deep and unambiguous circuit split that might warrant this Court's review. *See, e.g., United States v. Turkette*, 452 U.S. 576, 578 (1981) (granting certiorari in a RICO case to address a conflict between the First Circuit and eight other Circuits).

First, this case does not provide any occasion for resolving the asserted conflict because the claims are substantially domestic. *See* Point I(A), *supra*. For its part, the Ninth Circuit sustains RICO claims predicated on domestic racketeering. *See Chao Fan Xu*, 706 F.3d at 977 ("focusing on the pattern of Defendants' racketeering activity"). On the facts of this case, the Ninth Circuit would reach the same result as the court below and sustain the domestic RICO claims alleged herein because "the conduct alleged here clearly states a domestic cause of action" and the Complaint "satisfies every essential element of the mail fraud, wire fraud, and Travel Act claims" alleged as part of the domestic "pattern of conduct." Pet.App. 23a-24a. The "conflict" presented in the petition is thus

irrelevant to the ultimate outcome of the case, and the petition should be denied. *See* Stephen M. Shapiro *et al.*, *Supreme Court Practice* 249 (10th ed. 2013) (certiorari may be denied where the question presented is "irrelevant to the ultimate outcome of the case").

Second, the Ninth Circuit's conclusion about RICO's territorial scope was based, in substantial part, upon *Norex,* which has since been clarified by the Second Circuit. The Ninth Circuit stated:

> In the wake of *Morrison*, this circuit has not considered whether RICO applies extraterritorially. We have previously held, however, that RICO is silent as to its extraterritorial application. *See Poulos v. Caesars World, Inc.*, 379 F.3d 654, 663 (9th Cir. 2004). Other courts that have addressed the issue have uniformly held that RICO does not apply extraterritorially. *See generally Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 33 (2d Cir. 2010); *European Cmty. v. RJR Nabisco, Inc.*, 2011 U.S. Dist. LEXIS 23538, 2011 WL 843957, at *5 (E.D.N.Y Mar. 8, 2011); *In re Toyota Motor Corp.*, 785 F. Supp. 2d 883, 913 (C.D. Cal. 2011); *Sorota v. Sosa*, 842 F. Supp. 2d 1345, 1349 (S.D. Fla. 2012).

Chao Fan Xu, 706 F.3d at 974. The post-*Morrison* authorities relied upon by the Ninth Circuit -- namely, *Norex* and three district court decisions relying upon *Norex* -- substantially formed the precedential basis for the Ninth Circuit's ruling that "RICO does not apply extraterritorially." *Id.* at 974-975. As of today, however,

the Second Circuit has clarified *Norex* on several occasions (Pet.App. 7a-9a, 12a, 56a, 61a, 63a-67a) and confirmed that *Norex* should not have been read "as a ruling that RICO can never have extraterritorial reach in *any* of its applications." Pet.App. 9a (emphasis in original). Because the brief, *per curiam* opinion in *Norex* was the first federal appellate decision to address RICO extraterritoriality in the aftermath of *Morrison*, it generated widespread confusion among the lower courts. The Second Circuit's authoritative clarification of *Norex* dispels that confusion and puts in doubt the Ninth Circuit's *Norex*-rooted reasoning about RICO's scope.[6]

Third, once the issue has been allowed to percolate with the benefit of the Second Circuit's recent decision, it is likely that the Second Circuit's decision will resonate with the Ninth Circuit, particularly in light of the persuasive position of the United States. *See* U.S. Amicus Brief, 9-10 n.3 ("the United States believes that RICO meets *Morrison's* requirement of a 'clear indication of an extraterritorial application' in part because some of RICO's predicate crimes can only be violated by extraterritorial conduct").

Like the court below, the Ninth Circuit is a strong and consistent adherent to the cardinal principal that "we must

---

6. *Chao Fan Xu* also relied upon *Poulos v. Caesars World, Inc.*, 379 F.3d 654 (9th Cir. 2004). *Poulos* was a pre-*Morrison* decision, which applied the now-supplanted "conduct and effects" test, in a case involving only the domestic predicate act of mail fraud. *Poulos*, 379 F.3d at 659 ("The predicate act underlying the RICO claims is the Casinos' alleged violation of the mail-fraud statute, 18 U.S.C. § 1341"). *Poulos* has been superseded by *Morrison*, as noted by Reynolds. Pet. 15.

interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." *Boise Cascade Corp. v. United States EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991); *accord Garcia v. Brockway*, 526 F.3d 456, 463 (9th Cir. 2008) (*en banc*) (Kozinski, C.J.); *United States v. Neal*, 776 F.3d 645, 652 (9th Cir. 2015). Like the court below, the Ninth Circuit reads RICO "in its entirety" in ascertaining its proper application. *United States v. Rone*, 598 F.2d 564, 568 (9th Cir. 1979) ("A reading of § 1962(c) and Title IX in its entirety indicates that *any* enterprise which is conducted through a pattern of racketeering activity falls within the statute") (emphasis in original), *cert. denied*, 445 U.S. 946 (1980); *see also Petroleos Mexicanos v. Hewlett-Packard Co.*, No. 14-cv-05292-BLF, ECF No. 60 at 22 (N.D. Cal. July 13, 2015) ("nothing in the RICO statute or the cases cited suggests isolating the analysis of Section 1964(c) from the remainder of the RICO statute").

Consistent with this holistic approach, the Ninth Circuit reads interrelated statutes together to ascertain their territorial scope. For example, the Ninth Circuit "has regularly inferred extraterritorial reach of conspiracy statutes on the basis of a finding that the underlying substantive statutes reach extraterritorial offenses." *Chua Han Mow v. United States*, 730 F.2d 1308, 1311 (9th Cir. 1984), *cert. denied*, 470 U.S. 1031 (1985); *see also United States v. Felix-Gutierrez*, 940 F.2d 1200, 1205 (9th Cir. 1991) ("the crime of 'accessory after the fact' gives rise to extraterritorial jurisdiction to the same extent as the underlying offense"); *United States v. Hill*, 279 F.3d 731, 739 (9th Cir. 2002) ("harboring offense and the offenses of being an accessory after the fact, aiding and abetting,

and conspiracy, all [are] deemed to confer extraterritorial jurisdiction to the same extent as the offenses that underlie them"); *United States v. Layton*, 855 F.2d 1388, 1395 (9th Cir. 1988) ("Because the underlying substantive statute, § 351(a), reaches extraterritorial conduct, related statutes governing conspiracy and aiding and abetting should also be construed to apply extraterritorially"). Because the Ninth Circuit construes *separately enacted* statutes together to ascertain territorial scope, it follows, *a fortiori*, that the Ninth Circuit would likely read the interlocking provisions of RICO -- a *single*, integrated statute -- as a whole in ascertaining its territorial reach.

The likelihood of this outcome is reinforced by the fact that the Ninth Circuit's approach continues to be widely applied in the aftermath of *Morrison*. *See, e.g.*, *United States v. Ali*, 718 F.3d 929, 938 (D.C. Cir. 2013) ("when the underlying criminal statute's extraterritorial reach is unquestionable, the presumption [against extraterritoriality] is rebutted with equal force for aiding and abetting") (citations omitted); *United States v. Lawrence*, 727 F.3d 386, 395 (5th Cir. 2013) ("courts have 'inferred the extraterritorial reach of conspiracy statutes on the basis of a finding that the underlying substantive statutes reach extraterritorial offenses'") (citation omitted), *cert. denied*, 134 S.Ct. 1340 (2014); *see also United States v. Siddiqui*, 699 F.3d 690, 701 (2d Cir. 2012) (Wesley, J.) ("As for § 924, which criminalizes the use of a firearm during commission of a crime of violence, every federal court that has considered the issue has given the statute extraterritorial application where, as here, the underlying substantive criminal statutes apply extraterritorially"), *cert. denied*, 133 S.Ct. 2371 (2013); *United States v. Shibin*, 722 F.3d 233, 247 (4th Cir. 2013)

("as an ancillary crime to underlying crimes that apply extraterritorially, § 924(c) applies coextensively with the underlying crimes"), *cert. denied*, 134 S. Ct. 1935 (2014).[7]

Fourth, in the absence of a genuine conflict with the Ninth Circuit (or any other Circuit), Reynolds points to district court decisions. Pet. 17-18. However, virtually all of those fact-intensive decisions -- like *Chao Fan Xu* -- relied upon the now-clarified decision in *Norex*, and thus, they provide little or no basis for further consideration. In the future, it is likely that the district courts will be aligned with the decision of the Second Circuit, for the reasons stated above. At this time, however, even if there were a conflict between the decision below and an unappealed district court decision, such a "conflict" generally provides no basis for review by this Court. *See* Stephen M. Shapiro *et al.*, *Supreme Court Practice* 505 (10th ed. 2013).

---

7. Reynolds' reliance on *CGC Holding Co., LLC v. Broad & Cassel*, 773 F.3d 1076 (10th Cir. 2014) is misplaced. Pet. 16-17. The Tenth Circuit explicitly declined to reach the question of RICO extraterritoriality. *CGC Holding Co.*, 773 F.3d at 1098 ("we do not decide the merits of plaintiffs' claims, including the extent to which those claims involve an extraterritorial application of RICO [and] [s]ince the question of the extraterritoriality of a statute is a merits question, resolving it must await a final disposition from the court below"). Similarly, the D.C. Circuit declined to reach out to address the avoidable issue of RICO extraterritoriality, and thus allowed the issue to percolate for further development. *See Hourani v. Mirtchev*, 2015 U.S. App. LEXIS 13342 *13 (D.C. Cir. July 31, 2015) ("we need not wade into the thorny question of whether or when RICO applies to such foreign conduct" because plaintiffs "have litigated this case and framed their arguments on the assumption that neither RICO nor the Hobbs Act applies extraterritorially").

B. The Second Circuit Correctly Applied *Morrison*.

Contrary to Reynolds' argument that the decision below "contravenes *Morrison*" (Pet. 12, 31-35), the decision below was a straightforward and correct application of *Morrison*, and does not warrant further review.

(a) The Second Circuit's Decision Is Rooted In RICO's Text.

The Second Circuit, in a unanimous opinion authored by Circuit Judge Pierre N. Leval, accorded full effect to "the Supreme Court's ruling in *Morrison* that the presumption against extraterritorial application of U.S. statutes bars such application absent a clear manifestation of congressional intent." Pet.App. 7a (citation omitted); *see also* Pet.App. 3a (recognizing and applying the "presumption against extraterritorial application of a U.S. statute"); Pet.App. 16a (same). Reynolds overlooks the Second Circuit's faithful application of the presumption against extraterritoriality, and it gratuitously and incorrectly criticizes the Second Circuit for its treatment of the presumption. *See, e.g.*, Pet. 12 ("the Second Circuit[] . . . once again degrades the presumption against extraterritoriality").

Mindful of the presumption against extraterritoriality, the Second Circuit carefully considered and applied RICO's "text" (Pet.App. 9a-11a), and thus adhered to this Court's teaching that "when it comes to 'the scope of [the] conduct prohibited by [the statute], *the text of the statute controls our decision.*'" *Morrison*, 561 U.S. at 261 n.5 (citation omitted) (emphasis added); *id.* at 265 (calling for "'the most faithful reading' of the text") (citation omitted);

id. at 267 n.9 (test "based on the text" is "the better one"); *id.* at 270 (criticizing proposed test for lack of "any textual support").

The Second Circuit's text-based judgment about the limited extraterritorial reach of RICO was both correct and narrow:

> We conclude that RICO applies extraterritorially if, and only if, liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate. Thus, when a RICO claim depends on violations of a predicate statute that manifests an unmistakable congressional intent to apply extraterritorially, RICO will apply to extraterritorial conduct, too, but only to the extent that the predicate would. Conversely, when a RICO claim depends on violations of a predicate statute that does not overcome *Morrison*'s presumption against extraterritoriality, RICO will not apply extraterritorially either.

Pet.App. 9a. This was a straightforward application of *Morrison.*

Circuit Judge Peter W. Hall, concurring in the denial of rehearing *en banc*, reaffirmed that the Second Circuit's construction of RICO "is wholly consistent with *Morrison.*" Pet.App. 63a. Judge Hall stated:

> In *Morrison*, the Supreme Court explained that there is a presumption against construing United States statutes as applying extraterritorially

> but that the presumption is overcome when the statute clearly manifests a congressional intent that it apply extraterritorially. *See Morrison*, 561 U.S. at 265. Courts are not to justify extraterritorial application by speculating that Congress would have wanted that had it focused on the question. On the other hand, when Congress, acting within its powers, has explicitly provided for extraterritorial application of a statute, as it has done by incorporating statutes that apply extraterritorially into RICO as predicates, the statute must be interpreted as Congress has directed. The purpose of *Morrison* was to bar courts from attributing to Congress an intent that its statutes apply extraterritorially in the absence of a clear expression thereof; it was not to prevent courts from giving effect to Congress's clearly manifested intentions that certain statutes apply extraterritorially.

Pet.App. 63a. *See* Pet.App. 100a (Lynch, J., dissenting from denial of rehearing *en banc*) ("By including certain crimes with extraterritorial application as RICO predicates -- including some that can *only* be committed abroad -- Congress unequivocally expressed its intention that RICO apply to patterns of racketeering activity that include such crimes") (emphasis in original).

(b) The Second Circuit Correctly Construed RICO As A Whole.

Reynolds argues that the Second Circuit "misunderstands RICO" (Pet. 31) and it should not have

read RICO's predicates as an integral part of RICO itself. Pet. 32-33 ("the clear congressional intent to make some predicate statutes extraterritorial" does not indicate "clear congressional intent to make *RICO itself* extraterritorial"). In fact, however, the Second Circuit correctly and necessarily read the RICO statute as a whole in ascertaining its territorial scope.

Morrison confirms that it is necessary to construe a statute as a whole to ascertain its territorial scope. *Morrison* considered the relevant provisions of the Securities Exchange Act of 1934 before concluding that it lacked extraterritorial reach. *See Morrison*, 561 U.S. at 261 (Section 10(b) of the Exchange Act "contains nothing to suggest it applies abroad"); *id.* at 268 ("the exclusive focus on *domestic* purchases and sale is strongly confirmed by §30(a) and (b) [of the Exchange Act]") (emphasis in original); *id.* at 267 ("primacy of the domestic exchange is suggested by the very prologue of the Exchange Act"). *Morrison* also considered separately enacted statutes -- the Exchange Act and the Securities Act of 1933 -- to ascertain the territorial scope of the Exchange Act. *Id.* at 268-269.

Morrison's consideration of the overall statutory scheme comports with long-settled law. As Chief Justice Rehnquist observed, in ascertaining a statute's territorial scope, a court must construe the statute "as a whole." *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 255 (1991) ("*ARAMCO*"); *accord Branch v. Smith*, 538 U.S. 254, 281 (2003) (plurality opinion) (Scalia, J.) ("it is, of course, the most rudimentary rule of statutory construction . . . that courts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part, including later-enacted statutes") (citations omitted).

Consistent with the foregoing, the Second Circuit correctly read RICO's integrated, interlocking provisions as a whole in ascertaining its territorial scope. Pet. App. 7a-8a, 9a-12a. The Second Circuit explained its decision to read RICO as an integrated whole:

> It might be argued that Congress's clear statement in the predicate statute that *it* applies extraterritorially does not constitute a congressional statement that a RICO charge predicated on that statute applies extraterritorially. This overlooks the fact that the predicate statutes are incorporated by reference into the RICO statute and are a part of it.

Pet.App. 18a n.8 (emphasis in original). The Second Circuit's approach thus comports with *Morrison*, *ARAMCO*, and *Branch*.

Throughout its petition, Reynolds relies upon certain individual dissents from the denial of rehearing *en banc*; however, the intra-Circuit dissention boils down to whether RICO should,[8] or should not,[9] be read as a whole

---

8. *See, e.g.*, Pet.App. 7a-8a, 13a, 18a n.8 (main opinion of the Court); *id.* at 55a-58a (*per curiam* opinion of the Court); *id.* at 61a-63a (Hall, J., concurring in the denial of rehearing *en banc*); *id.* at 100a (Lynch, J., dissenting) ("By including certain crimes with extraterritorial application as RICO predicates—including some that can *only* be committed abroad—Congress unequivocally expressed its intention that RICO apply to patterns of racketeering activity that include such crimes") (emphasis in original).

9. *See* Pet.App. 71a (Cabranes, J., dissenting) ("Although it is indisputable that Congress intended for certain RICO predicate

in ascertaining its territorial scope. In construing RICO as a whole, the Second Circuit applied the settled approach of *Morrison*, *ARAMCO* and *Branch*, and the intra-Circuit dissention at the *en banc* stage in the court below is thus immaterial. In any event, an internal circuit split (if one can be inferred from the individual dissents at the *en banc* stage) is not a sufficient ground for granting review. *Joseph v. United States*, 135 S. Ct. 705, 705 (2014) ("we usually allow the courts of appeals to clean up intra-circuit divisions on their own") (Justice Kagan, with whom Justice Ginsburg and Justice Breyer join, respecting the denial of certiorari); *see also Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (*per curiam*) ("[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties").

Seeking to circumvent RICO's clear, integrated text, Reynolds requests that this Court grant review and impose a civil-criminal distinction in the construction of RICO. *See, e.g.*, Pet. 12, 13, 23, 25, 27, 28, 30, 35 (suggesting special rules for civil litigation). Nothing in the interwoven text of RICO allows for that dichotomy. Moreover, this Court routinely rejects proposed civil-criminal distinctions in the construction of hybrid statutes with criminal and civil application, such as RICO. *See, e.g., Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 488-500 (1985) (RICO's private civil remedy (§ 1964(c)) is not construed more narrowly than RICO's criminal provisions

---

statutes to apply to actions or events abroad, there is no clear basis for concluding that Congress intended for RICO itself to go along with them"); *id.* at 82a-83a (Raggi, J., dissenting) ("The terms of the extraterritorial crimes identified as RICO predicates authorize extraterritorial jurisdiction for prosecutions under the referenced proscribing criminal statutes, not for RICO claims alleging such predicates").

(§ 1961 or § 1962) to include a prerequisite for a prior criminal conviction or a racketeering injury); *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 660 (2008) (RICO's private civil remedy (§ 1964(c)) may not be read to include a "first-party reliance" requirement where the relevant predicate act (mail fraud) imposes no such requirement); *accord Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) ("we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context . . ."); *Basic Inc. v. Levinson*, 485 U.S. 224, 240 n.18 (1988) ("We find no authority in the statute, the legislative history, or our previous decisions, for varying the standard of materiality depending on who brings the action . . ."); *Aaron v. SEC*, 446 U.S. 680, 691 (1980) (statute is consistently applied "regardless of the identity of the plaintiff or the nature of the relief sought"). The Second and Ninth Circuits agree that there is no civil-criminal distinction in the construction or application of RICO. Pet.App. 13a (citing 18 U.S.C. 1962(c), 1964(c)); *id.* at 8a (citing 18 U.S.C. 1962, 1964); *id.* at 9a (RICO is consistently applied in cases imposing "liability or guilt"); *Chao Fan Xu*, 706 F.3d at 975 (RICO is applied consistently "in a civil or criminal context").

While overlooking the interrelated provisions of RICO, Reynolds misstates the holding of the Second Circuit. Reynolds argues that the Second Circuit "misunderstands RICO" because it treated RICO as "'an aggravating statute that simply adds new consequences to the predicate offenses.'" Pet. 31-32 (citation omitted). In attributing that "misunderstanding" to the Second Circuit, Reynolds inexplicably omits the full quote from

the Second Circuit, which states:

> The RICO statute incorporates by reference numerous specifically identified federal criminal statutes, as well as a number of generically described state criminal offenses (known in RICO jurisprudence as "predicates"). 18 U.S.C. § 1961(1). It *adds new* criminal and civil *consequences to the predicate offenses* in certain circumstances — generally speaking, when those offenses are committed in a pattern (consisting of two or more instances) in the context of "any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1962; see also id. § 1964.

Pet.App. 7a-8a (emphasis added). By selectively referencing only the italicized text above, Reynolds fails to faithfully restate the holding of the Second Circuit, which confirms that the predicate offenses -- alleged as part of a pattern -- together represent one of several elements of a viable RICO claim or prosecution under the integrated statute, and the Court did not rule that the predicates "simply" give rise to liability or guilt under RICO in the absence of the other statutory prerequisites.[10]

---

10. Reynolds compounds its misstatement by attributing a quote to the Second Circuit (purportedly appearing at Pet.App. 15a) that does not appear in the court's opinion. *See* Pet. 32 ("with the courts effectively '*looking through*' to the underlying predicate statutes") (emphasis added).

(c) The Second Circuit's Decision Is Reinforced By RICO's History.

While RICO's text is clear and unambiguous (and thus there is no need to consider legislative history), the Second Circuit's construction of RICO as an integrated whole is reinforced by RICO's legislative history, as confirmed by Judge Hall. *See* Pet.App. 61a-62a.[11] Reynolds overlooks this legislative history.

After the terrorist attacks of 9/11, Congress amended RICO through the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act, "which, among other provisions, amended RICO by adding to its list of predicates nearly 20 antiterrorism statutes that expressly apply to foreign conduct." Pet.App. 61a-62a (Hall, J., concurring in denial of rehearing *en banc*) citing Pub. L. No. 107-56, § 813, 115 Stat. 272, 382 (Oct. 26, 2001), codified at 18 U.S.C. 1961(1)(G). Judge Hall underlined that the House Report explained that the amendment of RICO to include acts of terrorism as predicate acts would expand the reach of RICO in both criminal and civil contexts. *Id.* The House Report states: "These provisions merely enhance the civil and criminal consequences of certain crimes that have been deemed RICO predicates by Congress and provide better investigative and prosecutorial tools to identify and prove crimes." *See* Report of the House Committee on the Judiciary, H. Rept. 107-236 on H.R. 2975 (Part 1) at 70 (Oct. 11, 2001).

---

11. "[S]tatutory language, context, history, or purpose" may be considered to ascertain a statute's territorial scope. *Small v. United States*, 544 U.S. 385, 391 (2005).

The House Report explicitly stated that the amendment would enhance RICO in the private, civil context: "Anyone injured by a RICO violation may recover treble damages, court costs, and attorney fees under the civil RICO laws." *Id.* at 70.

The USA PATRIOT Act's legislative history also confirms that RICO and its incorporated predicates (notably, money laundering) operate as an integrated whole in both criminal and civil contexts. The USA PATRIOT Act expanded the scope of the money-laundering statute to provide for inclusion of foreign corruption offenses as money-laundering crimes. Pub. L. No. 107-56, § 315, 115 Stat. 272, 308 (Oct. 26, 2001), codified at 18 U.S.C. 1956(c)(7). While enacting this expansion of 18 U.S.C. 1956, Congress concomitantly rejected an amendment proposed for the benefit of the "tobacco companies" that would have limited their "RICO liability." *See* 147 Cong. Rec. H7198 (daily ed. Oct. 23, 2001). Then-Senator (now U.S. Secretary of State) John F. Kerry confirmed that the USA PATRIOT Act provided for the continued protection of U.S. allies in their "civil" actions in U.S. courts under U.S. law. *See* 147 Cong. Rec. S11028-29 (daily ed. Oct. 25, 2001) (statement of Sen. Kerry) ("our allies will have access to our courts and the use of our laws if they are the victims of smuggling, fraud, money laundering, or terrorism [and] [w]e shall continue to give our full cooperation to our allies in their efforts to combat smuggling and money laundering, including access to our courts and the unimpeded use of our criminal and civil laws").

The Second Circuit's construction of RICO as an integrated, coherent whole -- without resort to any civil-criminal distinction -- fully comports with RICO's text, structure, and history.

(d) The Second Circuit Correctly Rejected the "Domestic Injury" Limit.

Reynolds' attempt to use *Morrison* to restrict Section 1964(c) to domestic injuries (Pet. 24, 30, 31, 35) is unsupportable.

First, no court has adopted the proposed "domestic injury" requirement, and indeed, it has been widely rejected. *See* Pet.App. 55a-58a (rejecting domestic injury limit); *Petroleos Mexicanos v. Hewlett-Packard Co.*, *supra* (rejecting argument that Section 1964(c) imposes a "domestic injury" requirement), *citing*, *inter alia*, *Mitsui O.S.K. Lines, Ltd. v. Seamaster Logistics, Inc.*, 871 F. Supp.2d 933, 944 (N.D. Cal. 2012) ("*Morrison's* holding bars courts from refusing to apply RICO simply because the scheme's effects are felt abroad"), *remanded on other grounds*, 2015 U.S. App. LEXIS 11574 (9th Cir. Cal. July 6, 2015). The domestic injury limit was properly rejected by the unanimous Second Circuit (Pet.App. 55a-58a) and not one of the 15 Judges of the Second Circuit who participated below affirmatively embraced the proposed limit.

Second, *Morrison* rejected a domestic injury test very similar to the one advocated by Reynolds here. *Morrison* recalled that the Second Circuit applied Section 10(b) of the Exchange Act under its so-called "'effects test,' 'whether the wrongful conduct had a substantial effect in the United States or upon United States citizens.'" *Morrison*, 561 U.S. at 256 *quoting SEC v. Berger*, 322 F.3d 187, 192-193 (2d Cir. 2003). *Morrison* squarely rejected this test, as Reynolds recognizes. Pet. 13-14. *Morrison* thus provides no basis for Reynolds to revive the supplanted "effects test."

Third, the proposed "domestic injury" limit has no textual support. Section 1964(c) provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court" and recover damages and other relief. 18 U.S.C. 1964(c). This provision is not limited to "domestic persons" or persons "domestically injured" or injuries to "domestic business or property." In the absence of an Act of Congress, this Court does not exclude foreign governments from the protections of U.S. law. *See Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 320 (1978) (declining to limit the reach of the Clayton Act to "only American consumers" and holding "[n]either the fact that the [plaintiffs] are foreign nor the fact that they are sovereign is reason to deny them the remedy of treble damages Congress afforded to 'any person' victimized by violations of the antitrust laws").

Fourth, this Court has consistently declined to engraft extratextual limitations upon RICO, such as Reynolds' proposed "domestic injury" limit. *See, e.g., Sedima*, 473 U.S. at 481 (rejecting the view that RICO provides a private right of action "only against defendants who had been convicted on criminal charges, and only where there had occurred a 'racketeering injury'"); *H. J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 244 (1989) ("the argument for reading an organized crime limitation into RICO's pattern concept . . . finds no support in the Act's text, and is at odds with the tenor of its legislative history"); *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 252 (1994) (rejecting the argument that "RICO requires proof that either the racketeering enterprise or the predicate acts of racketeering were motivated by an economic purpose"); *Bridge*, 553 U.S. at 660 ("RICO's

text provides no basis for imposing a first-party reliance requirement").

Accordingly, the Second Circuit correctly rejected the proposed domestic injury requirement, and this Court should not grant review in order to create one.

CONCLUSION

The petition for a writ of certiorari should be denied.

August 2015

Respectfully submitted,

KEVIN A. MALONE
CARLOS A. ACEVEDO
KRUPNICK CAMPBELL MALONE
BUSER SLAMA HANCOCK
LIBERMAN P.A.
12 Southeast Seventh Street
Suite 801
Fort Lauderdale, Florida 33301
(954) 763-8181

JOHN J. HALLORAN, JR.
Counsel of Record
JOHN J. HALLORAN, JR., P.C.
Westchester Financial Center
50 Main Street, Suite 1000
White Plains, New York 10606
(914) 682-2077
jjh@halloranlawpc.com

Attorneys for Respondents